BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

Opinions of the District Court consist of the two Reports of the Masters in Chancery (81-88; 98-153); opinion of the District Judge (168); opinion of the Circuit Court of Appeals, Sixth Circuit (643), reported 119 F. (2d) 157. No opinion was filed upon denial of petition for rehearing (672).

II.

Jurisdiction.

1. The date of the decree to be reviewed is March 14, 1941 (642); rehearing denied May 9, 1941 (672).

2. This suit was brought to enforce rights of petitioners, and others of a class represented by them, as holders of bonds issued by the drain district described in the foregoing petition. The District Court had jurisdiction by virtue of diversity of citizenship. *Judicial Code*, Sec. 24, U. S. C., Title 28, Sec. 41.

The statutory provision which is believed to sustain the jurisdiction of this Court is Sec. 240 of the *Judicial Code*, U. S. C., Title 28, Sec. 347.

3. The cases believed to sustain jurisdiction are as follows:

Wuchter v. *Pizzutti*, 276 U. S. 13;
Western & A. R. R. v. *Henderson*, 279 U. S. 639;
Hansberry v. *Lee*, 311 U. S. 32;
Southern Railway Co. v. *Walters*, 284 U. S. 190;
Stringfellow v. *Atlantic Coast Line R. R. Co.*, 290 U. S. 322;

West v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 61 S. Ct. 179;

Chase National Bank v. *City of Norwalk*, 291 U. S. 431.

III.

Statement of the Case.

We deem the recital of facts contained in the "Summary Statement of Matters Involved" in the accompanying petition for writ of certiorari, together with the facts recited in the Master's reports (81 and 98), a sufficient statement to serve this Court in its consideration of this brief. Same are hereby adopted and made a part of this brief.

IV.

Specification of Errors.

The errors in the decision of the Circuit Court of Appeals which are relied upon by petitioners in this case are set out in the statement of "Reasons Relied upon for the Allowance of Writ" in the accompanying petition for writ of certiorari (p. 9, *supra*). Petitioners will rely upon and urge before this Court all errors therein assigned. Same are hereby adopted and made a part of this brief.

V.

ARGUMENT.

Summary and Introductory Matters.

Since this is a class suit, we will refer to petitioners, and others in the class represented by them, as bondholders. We follow the grouping of questions involved, and reasons relied upon for allowance of writ of certiorari, but condense them to the following points:

1. Due process is denied petitioners by holding them barred from all remedies on their bonds by decrees in taxpayers' suits.

2. Lower court did not decide issues in accordance with local law.

(a) It rejected local interpretations of the drain statute in relation to the kind and character of drains which a Drain Commissioner is authorized to build.

(b) It rejected local authorities as to the effect of bond recitals.

(c) It held duties of officers and others in relation to collection of taxes and maintenance of funds dependent upon question of whether a legal drain had been constructed.

(d) It ignored the effect of statutes prohibiting collateral attack on the drain proceedings.

(e) It ignored the effect of local statutes and general law, in failing to award bondholders money in the bond redemption funds.

3. Lower court held it could not restrain use of taxpayers' decree to impede collection of taxes.

Recognizing that this Court must be convinced of the importance of the questions to be decided, as well as the lower court's error in deciding them, we shall discuss under each main point reasons which we think justify this Court in taking jurisdiction.

1. Denial of due process by holding bondholders barred from all remedies on their bonds by decrees in taxpayers' suits.

Courts, as well as other governmental agencies, must observe rules designed to afford due process, and this Court has no higher or more important duty to perform that that of enforcing the Fifth and Fourteenth Amendments. It has done so frequently where comparatively small

amounts are involved. In this case a large amount is involved, and the decision will directly affect a large number of persons.

Courts seldom deliberately disregard the obligation to afford due process. When they do so it is the result of errors in reasoning on some other matter. A frequent cause of this error lies in erroneous application of settled rules as to *res judicata*. Recently this Court was called upon, in *Hansberry* v. *Lee*, 311 U. S. 32, to reverse a State Court because of its erroneous application of such rules. This Court there said:

> "But when the judgment of a state court, ascribing to the judgment of another court the binding force and effect of res judicata, is challenged for want of due process, it becomes the duty of this court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes."

Undoubtedly the same statement would apply when judgments of lower Federal Courts are considered in connection with the Fifth Amendment. There is also considerable similarity between the *Hansberry* case and this in regard to the issues involved. There it was claimed that a former judgment was binding upon a litigant on the theory of representation by one of a class; here it is claimed on the theory of representation by a public officer.

We anticipate that respondents will say that this question need not be considered because the lower court might have reached the same conclusion without holding that the former decree was a binding adjudication, but we think such argument untenable in view of the language of the lower court's opinion. The principal question which the lower court declared was presented (649) included the fact of the decrees of the State Circuit Court in taxpayers' cases. Lastly,

it expressly says (655), "Those cases are res judicata as to the determinative facts of this controversy." The argument thus presented in the lower court's opinion shows that the factor pertaining to the effect of the taxpayers' decrees is so interwoven in the court's reasoning as to prevent the assumption that the court would have reached the same conclusion without it. See *State Tax Commission* v. *Van Cott*, 306 U. S. 511; *State of Minnesota* v. *National Tea Co.*, 309 U. S. 551. The principle is also well established that where an opinion gives two grounds for a conclusion, neither can be treated as *obiter* and disregarded by inferior courts. *Florida R. R. Co.* v. *Shutte*, 103 U. S. 118; *Union Pacific R. R. Co.* v. *Mason City & Fort Dodge R. R. Co.*, 199 U. S. 160. Unless this decision is reversed, it will require all District Courts in the Sixth Circuit to hold that decrees in taxpayers' suits against the validity of proceedings under which bonds are issued are binding adjudications against bondholders, even though they are strangers to the case in which the decree is rendered. We assume that this court, in the exercise of its supervisory jurisdiction, would prefer to correct the error now, if it is an error, before it becomes a rule of decision for courts in this circuit.

While the lower court says that petitioners are bound by a decree of the Circuit Court of Macomb County, Michigan, (23) in a suit by the Township of Erin holding assessments for drain taxes to be illegal and void, the court did not have before it any of the pleadings in any of the State Court cases set forth in the bill of complaint (13). From the one decree in the record and allegations concerning it in the pleadings, it is plain that this was an ordinary taxpayers' suit to relieve the Township from a tax against it. Relief was not prayed against bondholders, and no bondholders were named as parties or served with process. The record contains neither allegation nor proof that any bondholder knew that such suit had been commenced, and the brief time

during which it was pending, from August 22 to September 16 of 1932, would have prevented this knowledge reaching them. We believe it firmly established by this court that even if they had known that such a suit was instituted, they were not obliged to intervene therein, for the court said, in reversing the same Court of Appeals (*Chase National Bank* v. *City of Norwalk*, 291 U. S. 431 (441)):

> "The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger. * * * Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights."

While the District Court regarded this pronouncement as binding upon it, apparently the Court of Appeals disagrees with it, for in the course of its opinion (656) it indicated that petitioners should have intervened in the suits which resulted in the decrees.

The Court of Appeals' reasoning that the decree obtained by Erin Township was an adjudication against bondholders is difficult to account for on any known principle of law. Such decree amounts only to a declaration that taxes against Erin Township are invalid. It neither adjudicates the invalidity of taxes against other lands and municipalities, and lands of individual owners, nor the invalidity of bonds. The lower court ignores the principle which it formerly recognized in *Royal Oak Drain District* v. *Keefe*, 87 Fed. (2d) 786, that under the law of Michigan, courts are without jurisdiction in suits *in personam* to make decrees binding upon strangers, (*Kinner* v. *Spencer*, 257 Mich. 142; *Welch* v. *City of Lincoln Park*, 268 Mich. 440), and that no decree or judgment can be *res judicata* in another suit unless there be identity of issues and parties. *Leroy* v. *Collins*, 165 Mich. 380; *Jacobson* v. *Miller*, 41 Mich. 90. As we understand its views, they rest upon (1) Sec. 14, Ch.

10, Act 316, Michigan Public Acts 1923, providing that in any suit brought to set aside any drain tax or in any way attacking the legality of any drain proceedings, the Drain Commissioner shall be joined as a party; (2) *Godkin* v. *Rutterbush*, 147 Mich. 116, a decision which ordered a suit dismissed where a taxpayer sought to recover a tax paid under protest, but neglected to join the Drain Commissioner, in which decision the court expressed its opinion that the Legislature passed the statute because the Commissioner in a peculiar sense stands as the representative of those who are interested in the drain and in the collection of the tax; and (3) *Kersh Lake Drainage District* v. *Johnson*, 309 U. S. 485.

The first two grounds appear untenable under Michigan law, for as noted above, *Kinner* v. *Spencer* (*supra*), unqualifiedly denied the power of the court to grant any relief against bondholders, though it set aside taxes levied for a drain in a suit to which the Drain Commissioner was a party. The bill there prayed for an injunction against payment of the bonds, but the court refused such relief, saying: "None of the holders of such bonds were made parties to the suit." If the novel interpretation now placed by the lower court on this statute had appealed to the Michigan court, it is reasonable to suppose that it would have granted such relief. We submit, however, that the Court of Appeals virtually assumed legislative powers over the State of Michigan by placing an interpretation upon the statute which would make it confer a representative capacity upon the Drain Commissioner, and thus make any decree against him operate as a decree against all bondholders. The statutory provision is clear and explicit and requires no interpretation, and the court, in *Godkin* v. *Rutterbush* (*supra*), did not pretend to interpret it. Its explanation of reasons which it supposed prompted the Legislature to pass the law cannot be considered an interpretation, for the case called

for no enlargement of the express language of the Legislature. In Michigan, as elsewhere, the courts follow the rules set forth in *Detroit* v. *Township of Redford*, 253 Mich. 453, 455; (1) if the wording of a statute is unambiguous there is no room for construction; (2) the terms of a statute cannot be extended by construction beyond the obvious import of its language.

If the statute had expressly provided what the lower court has read into it, it would be invalid, (*Wuchter* v. *Pizzutti*, 276 U. S. 13) for one may not be made another's statutory representative for any purposes of a law suit unless provision is made for notifying the absent party.

We submit that the lower court has been misled in its interpretation of *Kersh Lake Drainage District* v. *Johnson*, 309 U. S. 485, and has extended it far beyond the intent of this court. This court there was reviewing a judgment of the Supreme Court of Arkansas and was, of course, bound by its interpretation of State law. It was attempting no independent interpretation of the State law and had no jurisdiction to do so. Its sole province was to determine whether the judgment of the State Court violated Federal law. Here there is no decision of a Michigan court which ascribes such representative capacity as the lower court has given to the Drain Commissioner, but on the contrary, the fair inference is that the State Court has expressly declined to bind bondholders on any theory of representation by the Drain Commissioner. *Kinner* v. *Spencer* (*supra*). In the *Kersh Lake* case there had been a prior adjudication of the same cause of action between identical parties in the State Court, and the only question before the Supreme Court was whether the ordinary rules as to *res judicata* must yield, where it appeared that the party previously defeated was bringing the second suit in order to obtain funds to pay over to creditors. Here the opinion nullifies well estab-

lished rules, which deny binding effect to a judgment between other parties on a different cause of action.

While the courts recognize that situations may occur where a party may stand in judgment for another, as in class suits, the rule of virtual representation is never applied unless it appears that the alleged representative necessarily and probably possessed the same interests as the absent party. The doctrine of virtual representation can never apply where their interests are adverse. *Hansberry* v. *Lee* (*supra*). The interests of bondholders and the Drain Commissioner here were certainly adverse, for in the case commenced by bondholders in the Federal Court the same Commissioner whom the lower court supposed was the bondholders' representative pleaded and did his best to prove that bondholders had no rights.

2. Circuit Court of Appeals did not decide issues in accordance with local law.

We presume that all will agree with the statement in *New England Mutual Life Insurance Co.* v. *Mitchell,* 118 Fed. (2d) 414: "The respectful attitude toward the local court, where there has been no decision on the precise question before us, is to consider the question in the light of the common law of the state, with a view to reaching the decision which reason dictates, and with the faith that the local court will reach the same decision when the question comes before it." The entire body of state law, both in statutes and court decisions, must be considered in the light of the customary rules of interpretation prevailing in the State. It is important that Federal Courts adhere to this principle, otherwise they are giving merely lip service to the doctrine of *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64.

The principal legal issues considered in this section of our brief are all now before the Supreme Court of Michigan in a mandamus proceeding entitled "City of Highland Park,

et al, v. Clark, et al," No. 41690. In this suit relators seek to compel the levy and spread of taxes to pay bonds issued for the construction of a project considered in *Village of Oak Park* v. *Van Wagoner*, 271 Mich. 450, one of the Michigan authorities cited by the Circuit Court of Appeals. Respondents contend that they should not be compelled to take this action, advancing the same arguments used by the Court of Appeals in its decision. We believe that this fact should be called to this Court's attention, as it is likely that it would prefer to postpone action on the petition until the Michigan Court has decided the *City of Highland Park* case. This would accord with procedure in *American Surety Company* v. *Baldwin*, 287 U. S. 156, see note p. 163.

(a) *Rejection by Court of Appeals of local interpretations of Drain Statute as to character of improvement Drain Commissioner was authorized to construct.*

The Michigan statute relating to drains contains no restrictions as to the form they shall take; their location, depth, capacity, methods and materials of construction are within the Commissioner's discretion. *Smith* v. *Carlow*, 114 Mich. 67; *Township of Swan Creek* v. *Brown*, 130 Mich. 382. The statute, as noted above, (Appendix, p.—) specifically authorizes their use for the removal of sewage, and the construction of sewage disposal plants as part of the drain project. The structure under consideration serves all drainage requirements, and contains no feature, appurtenance, or capacity for any contemplated sewage flow (240), but like any other channel or water course, sewage can be transported in it. On no reasonable basis can it be distinguished from the drains held legal in *Royal Oak Drain District* v. *Keefe*, 87 Fed. (2d) 786; *Kennedy* v. *Dingman*, 272 Mich. 24; and *Detroit Trust Co.* v. *Dingman*, 291 Mich. 170.

The Circuit Court of Appeals in its opinion (643) says this drain has been held to be predominantly a sewer in the *Township of Erin* case in the Circuit Court of Macomb County, but it has no support for that statement. The only word of the local court on the subject is the decree (23), which merely declares the proceedings void as to the Township, without stating any grounds therefor. There is no other local decision relating to this drain; hence there is no authoritative consideration of the subject by any local court. The Master concluded it was a sewer because it was like the Nine Mile-Halfway Drain, and because it had been included in a Master Plan for drainage and sewerage improvements in the southern part of Macomb County. Neither of these grounds is related to any conclusion of Michigan courts on the subject of the distinction between a drain and sewer. While *Township of Lake* v. *Millar*, 257 Mich. 135, related to the Nine Mile-Halfway Drain, which the Master said was similar in design, the court there was not called upon and did not pass upon the legality of the structure. It merely assumed that it was a sewer, and considered other questions raised. The so-called Master Plan was a preliminary engineering study which the Drain Commissioner had caused to be prepared, showing how existing and projected drains could be planned to give the maximum service in removing storm water and sewage. It was no part of the proceedings for this drain (624), and entirely immaterial. At the time the Martin Drain bonds were issued, there was no way in which bondholders could know that the Drain Commissioner had such a plan, unless they visited his office and inquired as to the meaning of a map which he had hung in his office (130).

The Federal Courts cannot say that this structure is illegal without pointing to some feature which makes it illegal. The presumption that the Drain Commissioner acted lawfully in designing it requires the court to regard

it as a legal structure until the contrary is proved. *Village of Clawson* v. *Van Wagoner,* 268 Mich. 148. The last decision of the Michigan Supreme Court, *Detroit Trust Co.* v. *Dingman* (*supra*), though relating to another drain, interpreted the Michigan Drain Law in its relation to the kind of drainage improvement which should be declared legal. It there quoted the provision authorizing the building of sewage disposal plants, and said because of this provision, "It conclusively appears the Legislature contemplated drains might be constructed for the purpose and with the intent that they should serve also as a means of disposing of ordinary sewage." The Circuit Court of Appeals could not disregard this decision and still decide the case according to Michigan law. The fact that the *Detroit Trust Company* case was decided while this case was pending on appeal did not excuse the Court of Appeals from applying it. *Vandenbark* v. *Owens Illinois Glass Co.,* 311 U. S. 635, 61 S. Ct. 347.

(b) *Rejection by Court of Appeals of local authorities as to the effect of bond recitals.*

An important question of public and commercial law is here involved. We think that the Court of Appeals has departed from a long line of decisions, particularly of this Court, and the courts of Michigan, in permitting these drain districts to gain an advantage by misrepresentations in their bonds. Hitherto the rule has always prevailed that a public corporation, like private corporations and individuals, is estopped from pleading its own wrong. It is a safe and salutary rule, beneficial both to investors and the public, for the certainty of its enforcement has in the long run enabled honest public corporations to borrow money for needed improvements, and to extend payment on their obligations, at low cost to their taxpayers. This decision, if followed, must ultimately drive investors to other forms of security involving less risk.

The rule which has long prevailed is accurately stated in *Dillon on Municipal Corporations* (5th Ed.), Art. 952, as follows:

> "The purchaser (of a municipal bond) is bound to see that there exists legislative power, that is a valid legislative act not in conflict with the state constitution for the issue of bonds, or commercial securities of the municipal, public or quasi corporation, and is bound to notice the contents and recitals in the instrument; but if such bonds are duly executed by the proper officers, and if these officers are by the true construction of the legislative enactment in that regard, invested with the power to decide whether conditions precedent have been performed, and the bonds contain a recital that such conditions have been complied with, or a recital which implies such compliance whether the preliminary conditions consist of facts *in pais* or facts of record—the issue of the bonds under such circumstances, with such a recital, is conclusive against the municipality (if the legislature has not otherwise provided) as to the fact or facts recited or implied in the recital, and estops it in an action by an innocent holder for value, before due, to show the contrary."

A vast amount of decisions in the Federal Courts, and all states of the Union, support this rule. It is applied without limitation to cases of this kind,—i. e., where municipalities have by recitals in their bonds expressly or impliedly represented that they are issued for a lawful purpose, but after their issue attempt repudiation on the ground that their own representation was false and that the real purpose was unlawful. This precisely is the claim of the districts, their taxpayers and other defendants. They say that the bonds were not issued for a drain, as they represent on their face, but for a sewer. To prove this they point to facts either in the design for the project, or in the motives of those who participated in the proceedings, and thus contradict their recitals of the due happening and perform-

ance of all required conditions precedent and full compliance with the law.

The opinion suggests that this recital is not of a fact, but of a condition of law, but we think that position is untenable. When one represents that he has complied with the law and that there is no condition, thing, or event which would render his act illegal, he necessarily is representing facts, not law. The party to whom the representation is made is not interested in an interpretation of the law, but in assurance that everything has been done, and nothing omitted, from which a claim of noncompliance could arise.

Recitals such as these in bonds *bona fide* held have uniformly been held to create an estoppel against pleading and proof of an actual unlawful purpose. *McQuillan, Municipal Corporations*, Vol. 6 (Revised), Art. 2497, 2502; 19 R. C. L. p. 1018, Art. 311; 44 C. J. p. 1253, Art. 425; 86 A. L. R. p. 1086. The leading case, *Hackett* v. *Ottawa*, 99 U. S. 86, is clearly reasoned and has never been disputed by the court of any jurisdiction. In Michigan the doctrine is announced in four decisions, never overruled or questioned. *Common Council* v. *Schlich*, 81 Mich. 405; *Thompson* v. *Village of Mecosta*, 127 Mich. 522; *Schmid* v. *Village of Frankfort*, 131 Mich. 197, and *Bates* v. *City of Hastings*, 145 Mich. 574.

In the *Schlich* case, the recital was compliance with a law authorizing bonds to provide funds for public improvements, but the real purpose was to grant aid to a railroad. In a summary of the arguments preceding the opinion, we see that the village contended for the same propositions asserted by the Court of Appeals, but the Michigan court overruled them, saying:

> "If defendant Schlich was a bona fide purchaser without notice of the real object for which these bonds were issued, the village is bound to pay them. This is the only question that can be involved in a suit brought

> to recover upon these bonds; for they would be void in the hands of those who knew the history of the transaction and the purpose for which they were issued."

The Court of Appeals made no reference to this decision.

In *Thompson* v. *Village of Mecosta* (*supra*), the bonds recited compliance with a similar statute, but actually they were issued to induce an owner of a grist mill to locate it in the village. The Michigan court answered the contention of the village that the bonds were void no matter in whose hands, because emanating from an ultra vires act, saying:

> "Was the bond void in the hands of a bona fide holder? This bond purports to have been issued under authority of a law which it mentions, and for the purpose prescribed by the act—a thing that the Village might lawfuly do. As a matter of fact it was not issued for such a purpose, but for a private improvement, and upon its face it unquestionably carried a false pretense; but a bona fide purchaser for value had a right to rely upon the statement of the board, appearing in the bond, that it was issued to borrow money under this act for lawful purpose, i. e., public improvements."

To show its complete adherence to the rule estopping the municipality to plead an unlawful purpose inconsistent with the recital, the court cites the leading authorities then in existence, among others the following: *Hackett* v. *Ottawa* (*supra*); *Risley* v. *Howell*, 64 Fed. 453; *Kent* v. *Dana*, 100 Fed. 56; *National Life Insurance Co.* v. *Board of Education*, 62 Fed. 778; *Coler* v. *Dwight School Twp.*, 3 N. Dak. 249; *Waite* v. *Santa Cruz*, 89 Fed. 619 (afterwards affirmed in 184 U. S. 302).

In *Schmid* v. *Village of Frankfort* (*supra*), under like circumstances the Michigan court, reversing a judgment for the village, said:

> "It is admitted that the bonds were illegal and void, because they were delivered to one Seeley in pursuance

> of a contract to aid a private enterprise, if they were delivered at all. At the same time they were valid upon their face, reciting that they were made and issued for a lawful purpose (p. 198). * * * Undoubtedly, if the purchasers had been aware of the resolution under which these bonds were issued, it would have been notice of their invalidity; but the evidence indicated that they had no such notice, and that they relied upon the recitals in the bonds, and an accompanying letter from the prosecuting attorney that the proceedings were, upon their face, valid, as to the vote of the electors to issue park bonds. We have held in several cases that one relying upon the recitals in a bond that it was lawfully issued may be a purchaser in good faith."

In *Bates* v. *City of Hastings* (*supra*), suit was instituted by a taxpayer to restrain the city from issuing bonds, alleging that its purpose was to use the proceeds to pay factory bonuses. The Michigan Supreme Court adopted a circuit judge's opinion, in which he said (582):

> "It may be presumed that the bonds which the bill alleges are about to be issued by the proper city authorities, will be valid on their face and may be disposed of to innocent purchasers. Such bonds in the hands of innocent holders, without notice, are collectible and the city must pay them (citing the Schlich, Thompson and Schmid cases, supra)."

The Court of Appeals also made no reference to this decision. It did, however, refer to the *Thompson* and *Schmid* cases, but said that they should be disregarded because "the villages themselves took part in a false recital, contrary to facts later sought to be asserted." With utmost respect to the Court of Appeals, we submit that this is an untenable distinction. It is novel because nowhere in the decisions does the Michigan court express this as a ground for its conclusion, and we think it wholly meaningless. The

representation was that of the village itself, just as here the representation is that of the drain district. There is no way in which an artificial body can make any recital or representation, or do any other act except through agents. It is not a question of participation, but one of actual responsibility as principal for the act of authorized agents.

The Court of Appeals says that it is the law of Michigan that where the projects are illegal from total lack of authority to construct the projects, bonds issued to defray the expense of such projects are void in the hands of innocent holders. It cites no authority for this strange doctrine, for there is none. No Michigan decision has so held, and it is unreasonable to expect that any should, for it would be contrary to the decisions above quoted. In each of those cases the projects were as illegal as any that could be imagined. Neither the villages nor their officials were acting within any authority or jurisdiction in the project in which they were actually engaged. Public credit was being used in aid of private parties. Projects were being financed which not even the Legislature could authorize as municipal enterprises, yet the court said that *bona fide* holding, plus the bond recitals, made the municipality liable.

While no case involving the effect of recitals in drain district bonds has been considered by the Michigan court of last resort, we believe it to be the duty of a Federal Court, under *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 61 S. Ct. 179, to ascertain from all available data what the state law is, and that it should consider any well reasoned opinion of a court exercising jurisdiction in the state which has been accepted by the bar and litigants. In the early part of the year 1939 Judge Fred M. Raymond, of the Western District of Michigan, in *Baker, et al.*, v. *Ruddiman No. 3 Valley Drain District, et al.*, had before him the precise question as here. The Ruddiman Valley No. 3 Drain District had built a drain and issued bonds therefor.

Later the State Court, in a taxpayers' suit (see *Township of Norton* v. *Cockerill*, 265 Mich. 405) held the project to be a sewer and restrained the levy of taxes against some properties and a township. In an unreported opinion rendered upon a motion of the drain district to set aside a default judgment, the court said:

> "This matter is before the court upon motion of Ruddiman Valley No. 3 Drain District to set aside its default entered about March 1, 1939, and the default judgment entered against it March 15, 1939. Assuming that defendant has made sufficient showing of excusable neglect in failure to appear and answer to entitle it to an order setting aside the default, there still remains the obstacle that it has not made showing of existence of competent evidence to establish a meritorious defense. See Koen *v.* Beardsley, 63 F. (2d) 595; William Lane, Inc. *v.* Selby Shoe Co., 45 F. (2d) 581; David A. Manville & Co. *v.* Francis Oil & Refining Co., 20 F. (2d) 473; Moore's Federal Practice, sec. 55.03.
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> "By the answer which this defendant asks leave to file, it denies that plaintiffs have the right to institute this proceeding as a class action. It also avers that the County Drain Commissioner had no jurisdiction or authority in law to assess the lands embraced in the so-called drainage district, for the reason that the construction was not for a drain but for the purpose of a trunk line sanitary sewer.
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> (We here omit a paragraph dealing with a question as to the court's jurisdiction.)
>
> "The International Typographical Union is a bona fide purchaser of the bonds. Recitals in the bonds certify that they were issued to build a drain pursuant to applicable drain laws and that all acts, conditions and things required to be done precedent to their legality had happened and had been performed in due form and time as required by law. In view of these recitals and upon well established authority, the court is of opinion that this defendant cannot now be permitted

to defend upon the ground of invalidity. See Royal Oak Drain Dist., Oakland County, Mich. *v.* Keefe (C. C. A. 6), 87 F. (2d) 786; Hackett *v.* Ottawa, 99 U. S. 86; City of Defiance *v.* Schmidt (C. C. A. 6), 123 F. 1; Thompson *v.* Village of Mecosta, 127 Mich. 522."

As the defeated party did not appeal and the judgment has been paid, which respondents can easily verify by an inspection of the records of the case, it may be regarded as evidence of State law. It is also evidence that jurists trained in Michigan law regard *Thompson* v. *Village of Mecosta* (*supra*) as a clear expression of Michigan law applicable to the plea of a drain district that it issued its bonds for something other than a drainage purpose.

There is no indication in any Michigan decisions that the Court of last resort disagrees with the general body of Federal law on the subject of bond recitals, or the rule condensed by Judge Dillon, which we have quoted. The rule necessarily implies that to be effective, the issuing officers must "by the true construction of the legislative enactment in that regard, be invested with power to decide whether the conditions precedent have been performed." The Master and District Judge properly construed the law as conferring implied authority on the Drain Commissioner. The report says (144):

"* * * Another important restriction requires that the officials making recitals be the ones logically authorized by statute to determine the truth of the fact recited. Northern National Bank of Toledo *v.* Porter Township, 110 U. S. 608, 28 L. Ed. 258 (1884); Moore *v.* Nampa, 276 U. S. 536, 72 L. Ed. 688 (1928). The restriction is hardly applicable to the case at bar, since the Drain Commissioner, who certified that the requirements of the Drain Act had been observed, would be the one official, if any, in a position to know whether there had been such compliance and there-

fore the one impliedly authorized to make the recitals. It does not appear to be necessary for the statute authorizing the issuance of bonds to expressly empower the issuing official to make recitals. See Bernards Twp. *v.* Morrison, 133 U. S. 523, 33 L. Ed. 726 (1890); City of Defiance *v.* Schmidt, supra; Gibbs *v.* School-District, supra. The Michigan case of Portsmouth Savings Bank *v.* Ashley, 91 Mich. 670, 52 N. W. 74 (1892), like the Anthony case, held that the bonds must have been duly executed before an estoppel can be invoked, the bonds in that case having been delivered without authority. The court found it unnecessary, in view of this holding, to discuss the rights of the bondholders against a defense that the bonds were issued for the unlawful purpose of aiding a railroad."

Spitzer v. *Village of Blanchard*, 82 Mich. 234, and *First Wisconsin National Bank* v. *Bessemer Twp.*, 286 Mich. 426, cited by the Court of Appeals, are in harmony with the general rule, and if one refers to the authorities which the former decision incorporates, *Dixon County* v. *Field*, 111 U. S. 83, and *Bernard Twp.* v. *Morrison* (*supra*), it is readily seen why they were decided against the bondholders. By the true construction of the legislative enactment, the officers who issued the bonds in those cases were not invested with power to decide whether the particular conditions precedent involved in those cases had been performed. In the *Village of Blanchard* case, the defect was the want of a proper election and excess of the debt limit. The issuing officers had nothing to do with the election, nor the determination of the assessed valuation to which the debt limit was related. In the *Township of Bessemer* case, authority was incomplete until the State treasurer had issued his certificate of full compliance. These drain bond issues were like the bond issues of the Villages of Mecosta, Frankfort, etc. The officials authorized to issue them were the only officers who could know their own purposes. *Chemical Bank & Trust Co.* v. *County of Oakland*, 246 Mich.

673, also cited by the Court of Appeals, supports petitioners' position, for there the recital was given effect even against the claim of an excess of debt limitation provision of the Constitution. The only other Michigan case cited by the Court of Appeals on this subject, *Portsmouth Savings Bank* v. *Ashley*, 91 Mich. 670, bears no relation to the subject, for there the bonds were never delivered. Officers, without any authority from the Village Council, delivered them without consideration. Of course, there could be no rights founded upon an instrument which never was issued.

With the utmost deference to the Court of Appeals, petitioners' complaint is that the court did not consider all the law of Michigan on the subject. By a superficial reading of some decisions, a selection of isolated passages therefrom, and application of unwarranted distinctions against other decisions, it arrived at a conclusion wholly at variance with Michigan law.

(c) *Error of Court of Appeals in holding duties of officers and others in relation to collection of taxes and maintenance of funds dependent upon question of whether a legal drain had been constructed.*

The Court of Appeals treats the obligation of officers and Macomb County, imposed by statute to provide for payment of the bonds, as worthless, unless the bonds from every standpoint are valid (650). If the enforceability of the bonds rests upon the ground of estoppel, the court holds that no one need recognize them or perform duties in connection with the raising and maintenance of funds for their payment. The court says that since the County and its various officers and boards which must levy and collect taxes did not sign the bonds, they could not be estopped and, therefore, no demand may be made against them for performance of their duties. This involves a strange distortion of legal reasoning.

If bonds are held enforceable against a municipality on the ground of estoppel an indebtedness is adjudicated, and its officials are then required to exert such taxing power as they have to provide funds for the payment of the debt. They are not concerned with the ground upon which the debt is adjudicated. If it were otherwise, there would be no practical benefit to a bondholder in obtaining a judgment upon bonds, where the only basis for such judgment is estoppel. His judgment would be a useless entry upon court records, if it did not afford him a basis for recovery of the amount adjudicated in his favor.

The County, under the amendment to the Drain Law, Act 331 Michigan Public Acts 1927, stands in the same relationship to the bonds as the assessing and collecting officers. It is obliged to advance and pay them out of its general funds, provided that such advancement shall not cause the debt of the County to exceed the constitutional limitation thereof. (Appendix 12.) The Court of Appeals has put into the statute a limitation which the Legislature did not see fit to include, by holding that this statute applies only to bonds issued to build a legal drain. We admit that the statute would not apply to invalid bonds, *i. e.*, those which the drain district is not obliged to pay, but contend that any bond adjudged to be the debt of the district, no matter on what ground the judgment rests, calls for the performance of the County's statutory duty. As before noted, the rule in Michigan forbids judicial interpretations to restrict or enlarge unambiguous language of the Legislature. The statute contains several conditions upon the right of the bondholder to call for payment, *i. e.*, there must be money in the general fund, and the advancement must not cause the County to exceed its debt limit. It does not say in addition to these limitations that it must also appear that a legal drain was constructed with the bond proceeds. If the Legislature had so intended it could have easily expressed this

additional limitation. A Federal Court should not assume legislative powers.

(d) *Error of Court of Appeals in ignoring effect of statute prohibiting collateral attack on the drain proceedings.*

In arriving at its conclusion that the districts and the taxpayers could attack in a collateral suit the validity of the drain, the court entirely ignored local statutes and decisions, which if considered would require a decision that the court is obliged to hold these matters foreclosed by failure to follow the statutory remedy of certiorari. The provision of the statute making certiorari the exclusive remedy of those who wish to attack the proceedings (Appendix 8) says in unambiguous language that there shall be no collateral attack, *i. e.*, "if no certiorari shall be brought within the time herein prescribed, the drain shall be deemed to have been legally established and the taxes therefor legally levied, and the legality of said drain and the taxes therefor shall not thereafter be questioned in any suit at law or equity." Probably the Court of Appeals felt that its view that the rights of bondholders had been barred by a prior adjudication made it unnecessary to consider this point, and naturally petitioners would be obliged to admit that if in some prior suit they had previously litigated their rights as bondholders, failure of the court to consider this point, or its erroneous view thereon, would not entitle them to relitigate. This only serves to emphasize what we have said on the first point in this brief, that the court's determination of the *res judicata* proposition is so essential to the decision that it cannot be regarded as an independent proposition.

This court has many times in the past sustained the validity of municipal bonds, where at the time of their issue judicial interpretations of empowering acts or the State Constitution assured purchasers that they were obtaining valid

obligations. It refused to adjudge the bonds void, where subsequent decisions placed adverse constructions upon the statute and the Constitution. *Douglas* v. *Pike County*, 101 U. S. 677; *Taylor* v. *Ypsilanti*, 105 U. S. 60.

In the former case this court said:

> "After a statute has been settled by judicial construction, the construction becomes, so far as contract rights under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment to the law by means of a legislative enactment."

Many states, as indicated in *Great Northern Railroad Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 364, follow the same rule, and Michigan is one of them. *Pittsburgh etc. Iron Co.* v. *L. S. Iron Co.*, 118 Mich. 109, 127; *Donohue* v. *Russell*, 264 Mich. 217, 219.

In the latter case the court said:

> "The effect of overruling a decision and refusing to abide by the precedent there laid down is retrospective and makes the law at the time of the overruled decision, except insofar as the construction last given would impair the obligations of contracts entered into or affect vested rights acquired in reliance on the earlier decisions."

It is true that in *Township of Lake* v. *Millar*, 257 Mich. 135, and *Meyering Land Co.* v. *Spencer*, 273 Mich. 703, the court said that this certiorari provision did not bar the suit because the jurisdiction of the Drain Commissioner was attacked, but that decision was contrary to the interpretations of the section which prevailed when the bonds were issued. The statute, its interpretation, and the expiration of the period for bringing certiorari, were conditions upon which parties necessarily relied in the purchase of their

bonds. The interpretations of this clause prior to the issuance of these bonds are clear.

In *Township of Clarence* v. *Dickinson*, 151 Mich. 270, plaintiffs in a collateral suit attacked the legality of a tax, and proved that while it was called a tax for the extension of a drain, it was really a tax for a new drain, and that the Commissioner lacked jurisdiction because the application was not signed by the number of persons required to sign applications for a new drain. Plaintiffs urged that inasmuch as the petition was not signed by the necessary number of qualified persons, the Drain Commissioner had no jurisdiction and the proceedings were a nullity and could be attacked collaterally. The court overruled this contention, saying:

> "I have no doubt cases may arise to which this law can have no constitutional application. Such a case will be presented if the proceedings before the Drain Commissioner violate constitutional rights. The fact that such cases may arise is no reason for declaring the law unconstitutional. It is to be presumed that the legislature intended to enact a constitutional law and not an unconstitutional law (Cooley on Constitutional Limitations, 7th Ed., p. 255), and it should be construed in accordance with this intent. The language of the statute indicates that the legislature intended to go to the limit of its authority, but it is also to be presumed that it did not intend to exceed those limits.
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> "Can the statute have constitutional application to this case? The only reason advanced for saying that it cannot, is this, viz., that equity can afford relief whenever the drain commissioner lacks jurisdiction. It is apparent from the foregoing reasoning that the lack of jurisdiction which will warrant relief in equity must arise from a violation of the Constitution. The objection to the jurisdiction in such cases must be a

valid constitutional objection. Such objection could be urged if no notice or opportunity of hearing was given to one whose property was to be taken for the construction of the drain, for he has a constitutional right to such notice, and if that right is disregarded, the proceedings are as to him a nullity. If, on the other hand, the objections to the jurisdiction are not of a constitutional character, it is obvious that the legislature has a right to say how they shall be raised, or, in its wisdom, deprive one altogether of the privilege of raising them.

"The jurisdictional objection raised by complainant is not of a constitutional character. The Constitution does not require the petition to be signed by five property owners liable to asessments for benefits. That requirement is purely statutory. The legislature might have dispensed with it altogether. It therefore possessed ample constitutional authority to declare how objections to its non-observance should be made. It had authority to declare that objections not so raised should be disregarded. It exercised that authority by the statute under consideration. That statute is therefore constitutional in its application to this case and it prevents complainants maintaining this suit."

This decision was reaffirmed in *Stellwagen* v. *Dingman*, 229 Mich. 159, where collateral attack was made upon drain proceedings and an injunction sought against the collection of a drain tax, because of a defective petition instituting the proceedings. The court said:

"In Township of Clarence v. Dickinson, 151 Mich. 270, wherein the objection was based on a claim that the requisite number of taxpayers liable to assessment for benefits had not signed the petition, it was held that 'the lack of jurisdiction which will warrant relief in equity must arise from a violation of the Constitution.' It was said that—

" 'Such objection could be urged if no notice or opportunity of hearing was given to one whose property was to be taken for the construction of the drain,'

but that there is no constitutional requirement as to the number who shall sign the petition; that the requirement was statutory; that the legislature might provide that objections should be raised in the manner provided by the statute (by certiorari), and that the denial of other remedy was not a violation of constitutional rights. This decision has been quoted from with approval in the more recent cases of Cummings v. Garner, 213 Mich. 408, and Heliker v. Oakland County, 216 Mich. 593, *and must be accepted as the settled law of this State.* That it is in line with the weight of authority will be seen by a perusal of the note on page 856 of 9 A. L. R."

The *Stellwagen* case was decided in 1924, but a short time before these bonds were sold, and there had been no intervening decision. Therefore, as the law stood when these bonds were issued, bondholders were assured that there could be no collateral attack unless through want of notice or fraudulent conduct in respect to hearings a taxpayer was deprived of a hearing. It could not be said that a taxpayer had a constitutional right not to have a sewer built and to be assessed therefor, because after it became known that taxpayers were asserting distinctions between drains and sewers the statute was amended to specifically authorize the building of sewers, and it was held that this amendment was within the constitutional power of the Legislature. *Township of Warren* v. *Engelbrecht,* 251 Mich. 608; *Gray* v. *Dingman,* 279 Mich. 62.

We frankly concede that cases decided after the bonds were issued indicate that a different construction will now be given to the certiorari statute, and if Michigan followed the rule of giving all changes of interpretation retroactive effect, we could not urge this point. But as before noted, that rule is limited so as not to disturb rights which parties have acquired in reliance upon the earlier interpretation.

(e) *Error of Court of Appeals in failing to award bondholders money in the bond redemption fund.*

The Court of Appeals further ignored local law in failing to pass upon the rights of bondholders to the fund subject to the direction of the District Court derived from taxes voluntarily paid.

Assuming that the lower court correctly held on some proposition that the bonds are void, it was not justified in denying all relief to bondholders. We believe that it is well established law that where taxes are paid voluntarily by taxpayers to create a fund to pay bonds which have been issued, the collecting agency holds this fund in trust for bondholders; (*Vickery* v. *Sioux City*, 104 Fed. 164; *Thompson* v. *Emmett Irrigation District*, 227 Fed. 560), also that as trustee it must distribute it in accordance with the purpose under which it was paid, and that such agency cannot refuse to do this because the bonds represent a debt which the municipality could not create. *Willis* v. *Board of Commissioners*, 86 Fed. 872; *City of Akron* v. *Barber Asphalt Co.*, 171 Fed. 29. The lower court, however, by denying all relief and ordering the bill dismissed deprives bondholders of all interest in the fund.

Under Michigan law (see p. 13 Appendix), this fund can only be used for the purpose of paying bonds. Those who paid the taxes to create it cannot have it refunded to them, as they failed to pay their taxes under protest and sue for the amount paid within thirty days. *Township of Norton* v. *Cockerill*, 265 Mich. 405; *Brooks* v. *Oakland County*, 268 Mich. 637. The effect of the lower court's decision is to turn this money over to Macomb County as a gift.

It is our contention that in any event this money should be paid to bondholders, as the bonds, even if invalid as obligations of the districts, can be treated as certificates of participation in the fund. *Chelsea Savings Bank* v. *Ironwood*, 130 Fed. 410.

3. Error of Circuit Court of Appeals in refusing to restrain use of taxpayers' decree to impede tax collections.

An important question which the Court of Appeals has apparently decided in conflict with the decision of this court in *Chase National Bank* v. *City of Norwalk*, 291 U. S. 431, and the Court of Appeals of the Eighth Circuit in *Fetzer* v. *Johnson*, 15 Fed. (2d) 145, relates to the power of a Federal Court to restrain by its injunction parties before it from using decrees or judgments they have obtained in courts of concurrent jurisdictions in a manner inimical to parties who properly seek relief before them. This Court of Appeals, by its decision in the *City of Norwalk* case, evidenced its extreme caution in enjoining parties from making use of a judgment of ouster from the streets of an Ohio city of a public utility corporation, where the mortgagee of the properties and franchises of the corporation had not been given its day in court. It still seems to adhere to the same theories which caused it to be reversed by this Court.

The District Court we think properly decided that it had power to enter such personal decrees in favor of and against parties before it, as the rights of such parties required. We think that when a Federal Court is called upon to administer equity, and has jurisdiction of the subject matter and parties, it has power to and should exercise its jurisdiction to the fullest extent to settle all matters in controversy and to afford complete relief, unless restrained by some express statutory or constitutional provision. There is no Federal statute which forbids a Federal Court to restrain parties in a proper case from taking advantage of a judgment or decree of a court of concurrent jurisdiction. If the bonds are valid, bondholders are entitled to have taxes pledged to their payment, and such taxes as may subsequently be levied, enforced. The court's jurisdiction

does not cease with a mere judgment in favor of bondholders. It continues to afford such relief as may provide for payment. *Riggs* v. *Johnston County*, 6 Wall. 166; *U. S.* v. *Council of Keokuk*, 6 Wall. 514. We submit that if the bonds are valid on any ground, and if bondholders are not barred by prior adjudication, they are entitled to injunctions restraining taxpayers who are parties to the suit from impeding officials from levying and enforcing the taxes. Such injunctions are not issued against other courts, but against parties who threaten wrongful use of such judgments and decrees.

VI

Conclusion.

The first and third propositions advanced in this argument, being comparatively simple questions of Federal law and vitally affecting the rights of all citizens, ought, we think, to be specifically decided by this Court. The second proposition may only be considered of importance in this Court insofar as it appears that the Court of Appeals departed from a proper course of action which a Federal Court should follow in administering state law. It is discussed in this brief because it is necessary to completely present boldholders' case. If the Court is reluctant to fully consider this proposition, we think a just decision will finally be reached if the Court of Appeals is reversed on the first and third points, and the case remanded with directions to fully consider all applicable local law relating to the second point.

We again call the Court's attention to the fact that the same legal issues decided by the Court of Appeals are now before the Supreme Court of Michigan awaiting decision. (See *ante* page 12.)

We, therefore, submit that the accompanying petition for a writ of certiorari ought to be granted.

DAVID M. WOOD,
48 *Wall St., New York, N. Y.*

RAYMOND J. DYKEMA,
2746 *Penobscot Bldg.,*
Detroit, Mich.,
Counsel for Petitioners.